IN THE SUPREME COURT OF MISSISSIPPI
NO. 2011-CA-00019

EATON CORPORATION, AEROQUIP-VICKERS, INC., EATON HYDRAULICS, INC. F/K/A VICKERS, INC., AND EATON AEROSPACE, LLC, MICHAEL S. ALLRED, MICHAEL H. SCHAALMAN **APPELLANTS**

v.

JEFFREY D. FRISBY, INDIVIDUALLY, KEVIN E. CLARK, INDIVIDUALLY, JAMES N. WARD, INDIVIDUALLY, DOUGLAS E. MURPHY, INDIVIDUALLY, MICHAEL K. FULTON, INDIVIDUALLY, RODNEY L. CASE, INDIVIDUALLY, BILLY D. GRAYSON, INDIVIDUALLY, FRISBY AEROSPACE, LLC, FRISBY AEROSPACE, INC., FOUR SEVENTEEN AEROSPACE, INC., TRIUMPH GROUP, INC. AND THE TRIUMPH GROUP SINGLE BUSINESS ENTERPRISE **APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY MISSISSIPPI

BRIEF OF APPELLANT EATON CORPORATION AND RELATED COMPANIES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Eaton Corporation, Aeroquip-Vickers, Inc., Eaton Hydraulics, Inc. f/k/a Vickers, Inc., Eaton Aerospace, LLC, ("Eaton"), plaintiffs/counter-claim defendants/appellants;

2. Frisby Aerospace, LLC, Frisby Aerospace, Inc., Triumph Group, Inc., ("Frisby") defendants/counter-claim plaintiffs/appellees;

3. Jeffrey D. Frisby, Kevin J. Clark, James N. Ward, Douglas J. Murphy, Michael K. Fulton, Rodney L. Case, William Grayson, defendants/appellees;

4. Michael S. Allred and Michael Schaalman, respondents/appellants;

5. Gregory T. Everts, respondent.

6. Reuben Anderson, Fred L. Banks, Jr., Luther T. Munford, and R. Gregg Mayer, Phelps Dunbar LLP, Jackson, Mississippi, counsel for Eaton;

7. Michael B. Wallace, John P. Sneed, and Rebecca Hawkins, Wise Carter Child & Caraway, P.A., Jackson, Mississippi, counsel for Eaton;

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9. Michael Schaalman and Steven J. Berryman, Quarles & Brady LLP, Milwaukee, Wisconsin, counsel for Eaton;

10. Gregory T. Everts, Emily M. Feinstein, Quarles & Brady LLP, Madison, Wisconsin, counsel for Eaton;

11. Alan W. Perry, Philip Sykes, J. Chase Bryan, and H. Barber Boone, Forman Perry Watkins Krutz & Tardy, Jackson, Mississippi, counsel for Frisby;

12. Edward Blackmon, Jr., Blackmon & Blackmon, Canton, Mississippi, counsel for Kevin J. Clark, James N. Ward, Douglas J. Murphy, Michael K. Fulton, Rodney L. Case, and William Grayson;

13. Robert D. McDuff, Jackson, Mississippi, counsel for Michael K. Fulton;

14. William E. McDaniels, Williams & Connolly, Washington, D.C., counsel for Kevin J. Clark;

15. Thomas E. Royals, Royals & Mayfield, Jackson, Mississippi, counsel for Frisby;

16. Lisa M. Ross, Jackson, Mississippi, counsel for Rodney L. Case;

17. Eric Sitarchuk, Morgan, Lewis & Bockius, LLP, Philadelphia, Pennsylvania, counsel for Frisby Aerospace and Jeffrey D. Frisby;

18. Thomas A. Bergstrom, Malvern, Pennsylvania, former counsel for James N. Ward;

19. James Clifton Johnson, II, Pigott & Johnson, Jackson, Mississippi, counsel for Kevin J. Clark, James N. Ward, Douglas J. Murphy, Michael K. Fulton, Rodney L. Case, and William Grayson;

20. W. Wayne Drinkwater, Jr. and Margaret Oertling Cupples, Bradley Arant Boult Cummings LLP, counsel for Michael Schaalman and Greg Everts; and,

21. James L. Robertson and Linda F. Cooper, Wise Carter Child & Caraway, P.A., counsel for Michael S. Allred.

SO CERTIFIED, this the 31st day of July, 2012.

Michael B. Wallace

MICHAEL B. WALLACE
Counsel for Eaton

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INTRODUCTION

The FBI caught the Frisby defendants[1] with trade secrets stolen from Eaton, but the Hinds County Circuit Court has allowed them to escape all civil liability and to use with impunity information taken from Eaton by fraud. The circuit court did so because the Court found that one of the lawyers for the Eaton plaintiffs,[2] the victims, had *ex parte* contact with a former trial judge on matters unrelated to the merits of Eaton's claim. But these actions, no matter how they are characterized, did not ultimately prejudice Frisby's ability to defend itself on the merits nor did they harm its ability to compete in the marketplace for aerospace contracts.

These actions thus bore no comparison to the Frisby actions which caused this suit: fraud, trade secret theft and spoliation of evidence, much of which is detailed in federal bills of particulars prepared after five of the defendants were indicted for federal crimes. S.104:27686-27701.[3] The Frisby defendants' actions have both cost Eaton valuable contracts and prevented it from ever proving exactly what the Frisby defendants stole.

While the record in this appeal is enormous, the decisive evidence consists of little more than an interrogatory answer quoted at 32:6616-18, ARE 46-48,[4] and a series of emails among

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[1] Defendants-Appellees Frisby Aerospace, LLC, Frisby Aerospace, Inc. n/k/a Four Seventeen Aerospace, Inc., Frisby Aerospace, Inc., Triumph Group, Inc., The Triumph Group Single Business Enterprise, Jeffrey D. Frisby, Kevin E. Clark, James N. Ward, Douglas E. Murphy, Michael K. Fulton, Rodney L. Case, and Billy D. Grayson are often collectively referred to herein as "Frisby." Where necessary, the individual engineer defendants Clark, Ward, Murphy, Fulton, Case and Grayson may be referred to as the "Engineer Defendants."

[2] Throughout this brief Plaintiffs-Appellants Eaton Corporation, Aeroquip-Vickers, Inc., Eaton Hydraulics, Inc., f/k/a Vickers, Inc., and Eaton Aerospace, LLC, will be collectively referred to as "Eaton."

[3] Those indictments were subsequently dismissed.

[4] The appellants have filed three volumes of record excerpts: Joint Record Excerpts which contain the docket sheet for the appellate record; Allred Record Excerpts ("ARE"), which contain excerpts relevant to the discovery motion; and Eaton Record Excerpts ("ERE") which contain excerpts relevant to the *ex parte* contact sanction. The record is cited as "Volume:Page." Where a record volume has been sealed, the citation is preceded by an "S."

Eaton's counsel (and other privileged documents) which are collected at ERE 131. They form the factual basis for the order and judgment from which this appeal is taken. This appeal arises out of:

* A $1.56 million sanction against Eaton's local counsel, Michael Allred, as well as Eaton and certain Wisconsin counsel, based on an inaccurate interrogatory answer which was found to have caused Frisby no prejudice, and

* Dismissal of Eaton's suit for alleged "fraud on the court" because Eaton knew about *ex parte* conversations between counsel Ed Peters and Judge Bobby DeLaughter, most of which concerned administrative matters and none of which showed improper influence on DeLaughter's rulings which were, if anything, too favorable to Frisby.

Neither the law nor the evidence in this case supports these rulings. Rather, they reflect a zeal and determination to purge Hinds County Circuit Court of the taint associated with misconduct in a Dick Scruggs case which has no parallel here. In this case there is no bribe or even hint of one. Ed Peters was hired to do legitimate work and he did legitimate work. But because Eaton had hired him it was summarily condemned through a series of procedures – unprecedented in this state – which unfairly impaired Eaton's ability to defend itself. Among other things, fraud was found even though the only official who actually heard witnesses, the Special Master, did not say that the evidence of fraud was clear and convincing. This Court may want to speak to those procedures, but the right result here is to reverse and remand for trial on the merits so that Eaton can finally hold Frisby accountable for thefts of Eaton's trade secrets.

STATEMENT OF ISSUES

1. Did the Circuit Court err in imposing a $1.56 million sanction against Eaton for an alleged intentional discovery violation based on the "willful neglect" of one of its inside counsel in i) not insisting that a document disclosed in an interrogatory answer also be listed in a

privilege log and in ii) relying on outside counsel concerning the assertion of privilege and timing of disclosure?

2. Did clear and convincing admissible evidence support the Circuit Court's ruling that Eaton committed a "fraud on the court" justifying dismissal because it knew that Ed Peters had *ex parte* conversations with Judge DeLaughter about matters unrelated to the merits of Eaton's claims?

3. In the alternative only, is Eaton entitled to an evidentiary hearing on the sanctions issue led by a neutral party before a circuit judge not from Hinds County who allows Eaton to put on its evidence without waiver of its attorney-client privilege as to all aspects of the on-going case?

STATEMENT OF THE CASE

Course of Proceedings and Disposition Below

Frisby's fraud, theft, and spoliation of evidence

The six engineer defendants worked for Eaton at its Vickers plant in north Jackson, one of Mississippi's oldest aerospace industries. When they went to work for Eaton they agreed that, if they left, they would return all "reports, drawings, electronic media or similar materials [in their] possession pertaining to the Company's business." 1:69. When, in 2002, Frisby Aerospace hired them away to North Carolina to make competitive a business Frisby had recently purchased, they signed statements attesting to the fact that they had returned all Eaton property, including "Technical data (stored in hard copy or computer generated)." 1:66.

Later in 2002, Milan Georgeff, former employee of Frisby, informed Eaton that he had seen Eaton drawings being used at the Frisby plant. Subsequently Eaton counsel Mike Allred met with Georgeff and Georgeff's counsel and entered into an agreement in which Georgeff put

his accusations in writing and Eaton agreed to indemnify Georgeff in certain respects. S.23:7831-38. Eaton went to the FBI and sought an investigation.

In January 2004, the FBI proved Georgeff was more than right. Armed with search warrants, it raided Frisby's offices and interviewed some of the defendant engineers in their homes. It found some 16,000 pages of Eaton "technical data" that the engineers had lied about and taken to Frisby.

The federal prosecutors also identified numerous Eaton plans that were used by Frisby to compete with Eaton for contracts, including contracts for the F-18, the F-15, F-15E, and F-22 aircraft, and the JSF Gun Drive, a contract awarded to Frisby rather than Eaton. S.143:34272, 34294 to 34295; S.143:34317 to S.143:34325. They specifically characterized two stolen computer programs as "trade secrets" and said Frisby had used an Eaton surface finishing technique essential to Eaton's business. Altogether, the FBI analysis of the stolen proprietary information occupied 48 CDs of documents. S.143:34272-34273.

The full extent of what was stolen will never be known. After the FBI executed its search warrant for Eaton material in Frisby's offices, the defendant engineers met with Jeff Frisby and a company lawyer. The company's director of engineering then twice emailed the engineers to "dispose of any questionable materials." S.43:10809-10. Defendant engineer Billy Grayson destroyed a floppy disk of Eaton documents the FBI had missed when it searched his office, S.47:12061, and destroyed all the Eaton material on his home computer using a "defrag" program. S.47:12061-64.

Suit filed in Hinds County Circuit Court

In July 2004, Eaton and its affiliates sued Frisby and the six engineers in Hinds County Circuit Court. Eaton was represented by Mike Allred as lead counsel. Attorneys from the

Quarles & Brady firm in Milwaukee, Wisconsin, Michael H. Schaalman, Gregory T. Everts, W. Brian Gaschler and Emily M. Feinstein each entered an appearance in December 2004.

Dispute over an interrogatory answer

Frisby and its engineers propounded extensive interrogatories to which Eaton responded through Allred in February 2005 with almost 200 pages of answers. One answer identified an agreement and "communications" Eaton had with Georgeff but asserted a common litigation privilege. *See* pp. 13-14, *infra.* Frisby immediately demanded that these documents be produced and said it would file a motion to compel, but it never did. With Allred's blessing, the agreement was produced by Georgeff counsel in separate litigation in North Carolina.

In early 2006, Frisby nevertheless moved to dismiss Eaton's case on the ground that the agreement with Georgeff was illegal. *But see* Miss. Ethics Op. 145 (March 11, 1988) (permissible to pay witness for expenses and loss of time). It filed the motion even though the FBI raid had shown that what Georgeff said was true. Frisby said that the interrogatory answer was evasive and so showed a wrongful intent. 9:1250.

Judge Bobby DeLaughter assigned the dispute to Special Master Jack Dunbar. The order appointing Dunbar approved *ex parte* contacts with Dunbar. 6:804. Dunbar concluded that the joint-defense privilege did not apply because, while Eaton and Georgeff were aligned against Frisby, they were not aligned in the same litigation. 26:4844, ARE 2. All of Eaton's documents about its dealings with Georgeff were then produced.

Dunbar subsequently found that there was a discovery violation because the interrogatory answer did not "fairly or adequately identify" the agreement in that it said that the agreement was "limited" when it was not. 32:6622, ARE 52. Thus, the answer was "inaccurate and misleading." *Id.* But he said the failure to list the document on a privilege log was not a discovery violation

because "the defendants were aware of Eaton's privilege claims asserted in all its answers to all discovery." 32:6621, ARE 51.

Dunbar next investigated the intent that lay behind the inaccuracy he had identified. Several of Eaton's lawyers were deposed. He found that Eaton had committed "willful neglect" by letting its outside counsel make discovery decisions. S.32:6714-15, ARE 106-07.

He recommended that Frisby's motion to dismiss be denied because its defense of the case had not been prejudiced. *Id.* at 6724; S.32:6724, ARE 116. He also recommended, however, that Eaton and outside Wisconsin counsel should be sanctioned in an amount equivalent to Frisby's expenses incurred in pursuing its motion to dismiss, S.32:6724-25, ARE 116-17, an amount eventually set at $1.56 million.

In late 2006, Eaton retained new Mississippi counsel, Reuben Anderson, Fred Banks, and Ed Peters. Allred withdrew from the case. Eaton also urged Judge DeLaughter to reject Dunbar's recommended sanction.

Judge DeLaughter, in early 2007, found that the interrogatory answer was inaccurate because it revealed that Eaton would indemnify Georgeff if he were sued but did not mention payment of other expenses or an offer of employment if he could not find another job. S.39:10235, ARE 128. But Judge DeLaughter said that anyone who read the answer "knew that some kind of indemnity agreement existed," S.39:10245-46, ARE 138-39, and yet Frisby had not moved to compel as required by the then recently-decided case, *Ford Motor Co. v. Tennin*, 960 So.2d 379 (Miss. 2007). S.39:10237-38, ARE 130-31, 10246, ARE 5. He reduced the sanction to the amount it would have cost Frisby to file a motion to compel and then ordered Frisby to provide evidence of its expenses within 14 days. S.39:10251-52, ARE 144-45; S.39:10258, ARE 6. Frisby's subsequent estimate was at least $22,400 to $44,800. S.140:10473-82.

Other DeLaughter rulings in 2007

During 2007, Judge DeLaughter issued several other substantive rulings, one in Frisby's favor and two in Eaton's.

For Frisby, he refused Eaton's request to enter a default against engineer defendant Billy Grayson for spoliation. He said it would be sufficient to instruct the jury that it could infer that the destroyed evidence would have been unfavorable. 40:13188-89, ERE 43-44.

In addition, Judge DeLaughter reversed a ruling in which Dunbar said that a letter from counsel asserting Fifth Amendment privilege was sufficient to preclude the deposition of any engineer who wanted to take that privilege. DeLaughter held, consistent with established Mississippi law, that the privilege must be invoked on a question-by-question basis. 34:11302, 11306-07, ERE 48, 52-53. *See State Bar v. Attorney L*, 511 So.2d 119 (Miss. 1987). This Court denied Frisby's interlocutory appeal on the issue.

Finally, Judge DeLaughter also reversed a recommendation that Eaton be sanctioned for failing to identify in discovery exactly how Frisby had used Eaton's trade secrets. That, he said, was something Eaton at that point had yet to discover and the sanction Frisby wanted "would be akin to imposing sanctions on a bank hold-up victim for being unable to tell enforcement authorities 'how, when, and where' the thief used the loot." 40:13254-58, ERE 64A-68.

Having overruled Special Master Jack Dunbar three times, Judge DeLaughter at the end of October 2007 replaced Dunbar with a new Special Master, Larry Latham. 40:13065-66, ERE 63-64.

Peters resigns and DeLaughter recuses after Scruggs publicity

In December 2007, news that Peters had been paid $1 million by Dick Scruggs to influence Judge DeLaughter in another case became public. Peters quit this case. Judge

DeLaughter recused himself from the case. He later resigned from the bench and pled guilty to lying to the FBI about his conversations with Peters in the Scruggs matters.

Senior Judge Yerger takes over and orders David Dogan to begin "inquiry"

Frisby then filed an "emergency" motion with Senior Judge Swan Yerger and asked him for relief from the scheduled engineer depositions. Judge Yerger assigned the case to himself and immediately stopped Eaton's depositions of the defendant engineers. 42:14062. Then Latham, the new Special Master, announced that Peters had spoken to him *ex parte* about becoming special master before Judge DeLaughter had called to appoint him. Peters had also asked Latham not to tell anyone about the conversation. 43:14337. Latham resigned. Judge Yerger then appointed David Dogan, his former law partner, to replace Latham as Special Master.

Discovery sanction reinstated

At Judge Yerger's request, Dogan reviewed Judge DeLaughter's ruling in the discovery violation matter. He found that Judge DeLaughter had not properly deferred to the findings of Special Master Dunbar, but recommended that the full fee sanction Dunbar recommended be reduced by an arbitrary 30% because Frisby had failed to file a motion to compel. 50:15774-78, ARE 154-58. On review, Judge Yerger rejected the 30% reduction, 53:16983-84, and ultimately imposed the entire $1.56 million as a sanction. S.134:32832, 45, ARE 169-182.

Other orders generally left undisturbed

Dogan and Judge Yerger also reviewed Judge DeLaughter's other orders. They reaffirmed the rejection of Eaton's request to default Grayson for his defiance of the search warrant and destruction of evidence. 53:16977-78, ERE 81-82; 63:18894. They agreed with Judge DeLaughter that it was premature to require Eaton to specify all uses that Frisby had made of the stolen trade secrets, and that Eaton should not be sanctioned for its answers as Dunbar had

recommended. But they required Eaton to reveal the uses of which it was then aware. 53:16979-82, ERE 83-86; 63:18879-81.

Discovery inquiry into Peters' relationship with DeLaughter begins

Over objection by Eaton, Judge Yerger announced that he was assigning to Dogan an "inquiry to determine whether Ed Peters attempted to or did improperly influence" Judge DeLaughter. 46:15210-11, 47:15307-08. When Eaton objected to the use of the Special Master, Judge Yerger replied that the only purpose was discovery: "this Special Master is charged to oversee the investigation, make a Report and Recommendation, and then *this Court* will resolve any issue." 49:15560 (emphasis in original). The Special Master agreed, "We are in a discovery deposition process." S.113:29483.

"Crime-Fraud" determination

More than a year later, Judge Yerger reviewed privileged documents from Eaton, Peters, Phelps Dunbar, Quarles & Brady in Wisconsin, and the Allred firm. In June 2009 he declared that the "crime-fraud" exception to the attorney-client privilege would apply to 13 documents which had been reviewed and redacted pursuant to *Hewes v. Langston*, 853 So.2d 1237, 1246 (Miss. 2003). S.104:27419-55, ERE 87-123. The documents are all included in ERE 1-31, together with two additional emails Eaton discovered and produced in April 2012, of which this Court can take judicial notice.[5] Miss. R. Evid. 201.

The "fraud," Judge Yerger concluded, was that Peters had *ex parte* contacts with Judge DeLaughter but had never entered an appearance in the case and was, Judge Yerger wrongly found, "secretly retained" by Eaton. S.104:27422, ERE 90. *See also* S.104:27440, ERE 108 ("obviously retained to benefit Eaton, without the knowledge of Frisby"); S.104:27441, ERE 109

[5] The two additional emails are Exhibits E and H to Frisby's Motion to stay Appeal filed in this court on May 8, 2012.

("secretly retained Ed Peters"); S.104:27443, ERE 111 ("secretly retained Peters"); S.104:27444, ERE 112 ("intentions to conceal its retention of Peters"); S.104:27449, ERE 117 ("no notice of his involvement to the Defendants"); S.104:27454, ERE 122 ("through fraudulently concealing Ed Peters' retention"). *See also* S.151:35459, ERE 232 ("involvement a secret"); S.151:35460, ERE 233. ("intentionally hid").

Over objection, counsel for Frisby was then allowed to depose at least 20 witnesses, including nine of Eaton's lawyers, with none of the *Hewes v. Langston* protections. The Special Master brushed aside hundreds of objections on grounds of attorney-client privilege. Judge Yerger refused to review the rulings and threatened to sanction Eaton if it appealed them. 113:29386. At the end of the process, Special Master Dogan produced a report on the depositions in which he listed various "red flags" supposedly ignored by Eaton and said Eaton had failed to explain why it had hired Peters. S.127:31410, ERE 132.

Eaton denied evidentiary hearing before judge

Frisby then renewed its motion claiming Eaton's case should be dismissed for fraud on the court. S.111:29104-67. After Judge Yerger proposed to send the motion to Special Master Dogan for disposition, Eaton objected, on several grounds. Eaton said Judge Yerger's workload was not an "exceptional condition" requiring referral under Miss. R. Civ. P. 53(c). It said that instead of a reference to Dogan, Judge Yerger should have a judge appointed who was not from Hinds County because Frisby was alleging a conspiracy involving both a former circuit judge and a current court administrator, Mary Gaines. S.133:32614-26, ERE 134-46.

Judge Yerger overruled the objections. He said Dogan was being asked to rule on a motion to dismiss, not on the merits of the case. S.133:32631-33, ERE 147-49. He then added that it was also not a criminal contempt case, so no special judge was required. And he said Eaton had waived any objection to his further participation. S.138:33457-61, ERE 150-54. In

response to one of several requests by Eaton to present live testimony in an evidentiary hearing, the Court held that "[Eaton] continues to request an evidentiary hearing [but] the numerous depositions essentially served as evidentiary hearings" and that "any additional hearing, in which evidence is received by way of redundant testimony, would result in a waste of time and expense." S.134:32853. *See also* S.151:35448, ERE 221 ("[Eaton] has continued to make requests for an evidentiary hearing before this judge, despite the Court's repeated rulings that such a hearing was unnecessary and not in the interest of judicial economy.").

Eaton denied right to present evidence

Dogan had said there was no explanation as to why Peters was hired. In its objections to Dogan's recommendation, Eaton referred to Ed Peters' work product which the court had reviewed under *Hewes* and found to be privileged because it showed legitimate legal work and was not evidence of a crime. Frisby moved for a declaration that this reference, and a citation to a privileged email, waived all of Eaton's rights to assert attorney-client privilege. S.138:33436-45. Judge Yerger agreed with Frisby, but said instead of finding waiver he would just forbid consideration of the evidence by either the Special Master or himself. S.140:33743-52. As a result, the circuit court simply disregarded all evidence of Peters' legitimate work because it was privileged.

In further procedural rulings the court said that Dogan did not have to hear live testimony and that Dogan could consider "302" documents, i.e., written summaries of statements Peters made to the FBI. S.145:34614-17, ERE 284-87; S.145:34619-27, ERE 289-97.

Dismissal ordered as a sanction

In August 2010 Special Master Dogan recommended that Eaton's case be dismissed. He rejected the "clear and convincing evidence" standard Eaton proposed and found misconduct to exist "by a preponderance of the evidence." S.145:34708-11, ERE 206-09. On review, Judge

Yerger excluded from consideration as "irrelevant" the discovery sanction on which Dogan had heavily relied.[6] He also said a "clear and convincing" standard should perhaps apply but, having reviewed Dogan's report, he found that its evidence met that standard. S.151:35453-56, ERE 226-29. He entered a judgment dismissing Eaton's complaint with prejudice and then certified it for immediate appeal pursuant to Miss. R. Civ. P. 54(b). 96:35471, ERE 241. Eaton timely appealed. 96:35476-79, ERE 242-45.

Other litigation

Since entry of judgment, Frisby has filed amended counterclaims in the circuit court. It has also filed a separate civil rights suit against Eaton pending in federal court in Mississippi and a "litigation misconduct" federal antitrust claim against Eaton in North Carolina. All of these actions assert claims that allegedly arise out of the dismissal order.

In a separate action, shareholders of Eaton have filed a derivative action against certain members of Eaton's board of directors and officers based on the rulings of the Hinds County Circuit Court in this case.

Recently, Eaton identified a three-page email string that should have been submitted to the trial court in 2008 for *Hewes* review but was not. Another search was conducted. One additional page – the extension of a previously-produced email – was found. On April 17, 2012, Eaton submitted those documents to the trial court, which ordered the four pages produced to Frisby on April 18, 2012. The trial court subsequently required Eaton to produce additional documents for its review.

[6] More than 18 pages of Special Master Dogan's recommendation was devoted to a claim that Georgeff's letter agreement was inconsistent with his later deposition. S.145:34657-75. But the FBI raid fully proved Georgeff's claims and, as it turned out, many of the pages in the recommendation were copied, word for word, from a Frisby brief. S.146:340803-16. So Judge Yerger said he gave them no weight.

As promised in its response to Frisby's unsuccessful motion to stay proceedings in this court, Eaton asks that this Court take judicial notice of the four pages pursuant to Miss. R. Evid. 201. They are found in ERE 1, with the other Eaton email evidence, all of which has been placed in chronological order for easier understanding.

STATEMENT OF FACTS

The discovery violation sanction

The principal interrogatory at issue regarding the Georgeff Agreement, as propounded by the engineers in late 2004, read as follows:

> Interrogatory No. 3:
>
> In paragraph 113 of your Complaint, you state that "(o)n about November 29, 2002, Plaintiffs first learned that the individual Defendants who were Eaton ex-employees, took with them to Frisby Aerospace all or a major portion of Eaton's engineering CAD designs, drawings and specifications." For this occurrence and for each additional occurrence on which you learned additional information, or confirmed previously learned information . . .
>
> 3(4) identify any and all documents that you have, you were provided, or you developed, that relate to what you were told;
>
> 3(5) state whether you have at any time since November 29, 2002, entered into any employment, consulting or other arrangement with any person identified in response to subpart (2) of this interrogatory; . . .

25:8120; *see also* 32:6616-17, ARE 46-47. Eaton's response to the engineers, found among responses Allred prepared, was:

> RESPONSE TO INTERROGATORY NO. 3:
>
> Answering further, Plaintiffs state that Plaintiffs have no employment, consulting or other agreement with Mr. Georgeff, except to say that *Plaintiffs have agreed in a written memorandum to extend a strictly limited indemnity to Mr. Georgeff to the limited extent that he may incur attorney's counsel and fees and other actual costs* in the event that defendants prosecute malicious litigation against him because of his status as a whistleblower.

> *Except to identify this agreement for purposes of a privilege log*, Plaintiffs do not waive by assert their attorney-client communications, attorneys work product, common litigation and other privileges *with respect to the written memorandum of agreement identified herein and any communications among principals with respect thereto.*

27:8304, *see also* 32:6617-18, ARE 47-48 (emphasis added).

The answer is inaccurate to the extent the agreement also indemnified Georgeff for expenses incurred while assisting Eaton, including his lost wages and fees of his independent counsel, and said that if he lost employment Eaton would help him get a job. That is why Special Master Dunbar called the use of the word "limited" to be "inaccurate and misleading." 32:6622, ARE 52.

Both Special Master Dunbar and Special Master Dogan found that the inaccuracy did not prejudice Frisby's ability to defend itself on the merits, S.32:6724, ARE 116; 50:15796-97, ARE 160.16-60.17; and there is no evidence to dispute that. On the contrary, Frisby immediately demanded production of the agreement and any related communications and threatened to file a motion to compel but never did so.

It is undisputed that, on Mike Allred's recommendation, the agreement was turned over to Frisby counsel in November 2005 by Georgeff when Frisby deposed him in another case. 4:2165; 2:1265-1272. Other documents were supplied when Special Master Dunbar overruled Eaton's claims of "joint defense" privilege in early 2006. 26:4842-46, ARE 4-8. So Frisby now has had the documents for more than six years.

The subsequent dismissal sanction

The circuit court made specific findings when it granted the sanction of dismissal. The backbone of its ruling, however, consisted of internal emails produced by Eaton which relate to Eaton's relationship with Ed Peters. 96:3549-63, ERE 232-36. All of it falls within the year during which Peters worked for Eaton, roughly December 2006 to December 2007. The emails

are collected and placed in chronological order in ERE 1-31. The circuit court approved all redactions. Redactions deleted material not relevant to Ed Peters' relationship with Judge DeLaughter. The email showing what Eaton knew will be summarized here. Facts concerning the specific findings will be stated with the later argument that pertains to each finding. *See* pp. 32-38, *infra.* The email can be grouped into six categories, which are taken here in chronological order.

1. **Reasons for hiring Peters.** On December 1, 2006, Mike Allred wrote to other Eaton lawyers and recommended that Ed Peters be retained. He said:

> He was for 30 years the district prosecuting attorney in Hinds County. He is the one person who is the closest possible associate of Judge DeLaughter. He is also well-respected prosecuting attorney. He is not someone who would do a lot of original legal research, but he can make a very powerful presentation in court if we do that work for him.

S.119:30394, ERE 1.

2. **Fee Arrangement.** Vic Leo, an in-house lawyer at Eaton, on February 28, 2007, wrote to Fred Banks in response to Banks' inquiry about finalizing fee arrangements with Phelps Dunbar LLP going forward, "I was hoping to have fee agreements finalized with [?] and Ed by now but I need to get things settled with Allred . . . ." S.122:30701, ERE 9. On March 8 he told other in-house counsel where he was headed on fee arrangements, including "Ed would be on a straight contingency of 1% of the recovery. In the event of a non-monetary recovery he would be paid a $250,000 flat fee if resolved before trial or $350,000 flat fee if resolved after trial." S.119:30399, ERE 10.

On March 28, Leo wrote to Fred Banks that he was working out a fee arrangement with Quarles & Brady and that he hoped to "use it as a template for agreements with your firm and Ed Peters." S.121:30574, ERE 15. He said he had talked to Ed and he had agreed "to just wait until

Judge DeLaughter issues his anticipated [motion to dismiss] rulings (hopefully within the next week or two) and then we will finalize our deal." *Id.*

3. **Objections to discovery violation recommendation.** On December 8, 2006, Allred wrote:

> I spoke to Ed Peters about the hearing on 1-26-07. He agrees that Judge DeLaughter is very unlikely to split the hearing and decision of these pending issues....

ERE 1A.

After the briefing on Frisby's motion to dismiss was completed, Peters wrote Leo, "The Ct is spending every free min on the Order..." After telling Leo that the court had been waiting for a document Frisby had just filed, he says "I doubt the Ct has even gotten our letter reply by today. We're moving with good speed; however, the Ct. has matters pending which I stated previously...." After a further discussion of a two-weeks delay, Peters wrote: "Vic if you can keep mgmt. off your back side for just a short time (relatively) I think they will be VERY pleased with you." ERE 11-13.[7]

On April 6, Judge DeLaughter rejected parts of the Dunbar discovery sanctions recommendation. Judge DeLaughter reduced the sanction against Eaton to the amount it would have cost Frisby to file a motion to compel and reduced the sanction against Allred to an undetermined amount. S.39:10226-57, ARE 119-50. The next day Vic Leo reported the following to others at Eaton:

> . . . Ed felt our chances [to retain a fall 2007 trial date] were good and he intends to speak to the court administrator and the Judge Monday about the trial date. This may take some finessing. Second, I asked what the chances were that the Judge would simply withhold ruling on the amount of any monetary sanctions against Allred and Eaton until later in the case,

[7] While not a part of the appeal record, this email string is in the Supreme Court record as Exhibit "E" to Frisby's May 8, 2012 Motion to Stay Appeal.

> possibly after trial. Ed said he believed that there was "a 100% chance that would happen, maybe I am off a per cent or two."

S.120:30402, ERE 15.

The email went on to say that the motion to dismiss for a discovery violation was Frisby's only defense to the case because there was no serious defense on the merits. *Id.* It predicts that Frisby will try "every other maneuver they can think of" including "motions to disqualify (Ed Peters – when he enters an appearance – and the Judge)." *Id.*

But Peters' "100%" prediction proved wrong. Judge DeLaughter on April 16 ordered Frisby to come forward within 14 days with evidence of what it would have spent to pursue a motion to compel against Eaton. Frisby did that, S.140:10473-82, but never pressed for a ruling and so no final amount was ever fixed.

4. **Would Peters' appearance require recusal?** Fred Banks was tasked with finding out whether there would be valid grounds for a motion to recuse Judge DeLaughter based on his relationship with Ed Peters. Banks asked Peters whether there was "any relationship at issue" other than the fact that Peters formerly employed DeLaughter. Peters told Banks he supported DeLaughter politically but that they did not visit in each other's homes and did not engage in any outside activities such as fishing together. He also said he had appeared before DeLaughter in other cases and no question had been raised either by opposing counsel or by Judge DeLaughter. S.119:30396-9, ERE 16-18. Banks reported that he saw no basis for recusal. S.113:29388.

On April 24, Leo reported internally at Eaton that he had not finalized fee arrangements for anyone. 122:30703. Another document says "Ed Peters – 1¼% contingency – Non-monetary." S.120:30403, ERE 20.

5. **Not listing Ed Peters.** In March 2007 Peters had mistakenly sent a confidential email to opposing counsel so he was no longer copied on some email. S.63:16126. On June 15,

2007, instructions were given by an assistant at the Quarles & Brady law firm to serve Ed Peters separately and not to "list Ed Peters on anything, even as a bbcc" because one of the Q&B attorneys "doesn't want the other side to see his name." S.122:30704, ERE 24.

6. **Meeting with Judge Lee.** On October 16, 2007, after federal judge Tom Lee called Judge DeLaughter and asked him to halt depositions which this Court had allowed to go forward, Eaton recommended that Reuben Anderson and Frisby counsel meet with Judge Lee to express a concern about Judge Lee's contact with Judge DeLaughter. Vic Leo reported internally at Eaton, "Judge DeLaughter felt uncomfortable about the contact from Judge Lee and certainly Ed Peters has taken his temperature of this meeting and he is recommending that we go forward with it." S.121:30573, ERE 26. One of Leo's colleagues responded: "Thanks. Good to know that Judge DeLaughter is supportive – my concern that I voiced to Sharon was that we might be putting DeLaughter in a tough position...." Leo responded: "Ed won't let us do that." ERE 27.[8]

SUMMARY OF ARGUMENT

The irony of this case is that Frisby got, without asking for it, the customary relief that would normally be sought for the misconduct alleged in this case:

> * An order compelling production would be the normal remedy for an interrogatory answer that incorrectly asserts a privilege and so does not completely describe the withheld document, but Frisby did not have to file a motion or obtain an order to get the Georgeff Agreement.
>
> * The usual remedy for *ex parte* contacts if they are unlawful is to bring in a new judge to reconsider prior rulings and preside over the case. Here Frisby got that when Judge Yerger took over the case on his own initiative. In addition Peters gave up his law license and DeLaughter was disbarred, albeit for other misconduct.

[8] While not a part of the appeal record, the complete October 16 email string is in the Supreme Court record as Exhibit "H" to Frisby's May 8, 2012 Motion to Stay Appeal.

So the question on appeal is not whether Frisby was entitled to some relief for what Eaton's former counsel did. Frisby got all the relief it normally could expect without opposition from Eaton. The question is whether Frisby was entitled to an additional $1.56 million sanction for the interrogatory answer and a dismissal sanction for Peters' *ex parte* contacts.

1. The circuit court should not have sanctioned Eaton $1.56 million for an error in an interrogatory answer that caused Frisby no prejudice. The standard of review is *de novo* because the trial court did not apply the appropriate legal standard. The proper test is whether Eaton showed a "gross indifference to discovery obligations" and it did not. The answer gave Frisby enough information to allow Frisby to contest the claim of privilege. That is all that was required. Frisby immediately contested the claim and that was proof positive that any inaccuracy in the answer did not prejudice Frisby. It was an error to fault Eaton's in-house lawyer, Sharon O'Flaherty, for not urging outside counsel to do something different. Because the interrogatory answer itself sufficiently identified the Georgeff Agreement "for the purposes of a privilege log" there was no practical need to duplicate that answer in a privilege log. And O'Flaherty properly relied on outside counsel to decide how the joint defense privilege would be asserted and whether it would be waived. In fact, Special Master Dunbar's decision to override the privilege was mistaken because this Court has said that the privilege can be asserted when the parties claiming it are involved in separate lawsuits against a common adversary. *Hewes*, 853 So.2d at 1249 (recognizing privilege for documents circulated among defense counsel in two related cases).

2. Eaton did not commit "fraud on the court" by hiring Ed Peters and knowing that he had had some contacts with Judge DeLaughter. Fraud on the court must be proven by clear and convincing evidence, i.e., evidence so clear no hypothetical reasonable juror could find otherwise. Special Master Dogan was unwilling to find that the evidence of fraud was clear and

convincing. Senior Judge Yerger erred when he slapped a *post hoc* "clear and convincing" label on Dogan's review. A hypothetical reasonable juror could believe that Eaton did not know of a contact between Ed Peters and Judge DeLaughter that crossed over the line into illegality and prejudiced Frisby. Not all *ex parte* contacts are unlawful.

Practice concerning *ex parte* contacts differs widely from jurisdiction to jurisdiction and Eaton was entitled to rely on Ed Peters and on Judge DeLaughter to know what was permitted and what was not. Many of the contacts were administrative in nature and therefore permissible. Frisby itself had contacts of that type with the circuit court. While it is true that on two occasions Peters predicted what Judge DeLaughter might do, lawyers are frequently asked to make predictions about courts. And, on the one occasion when Peters said he was "100 percent" sure, he was wrong because Judge DeLaughter did not delay imposition of a monetary sanction in the way Peters had predicted.

It is also true that the *ex parte* contacts did not prejudice Frisby's ability to defend on the merits. This Court can determine for itself that Judge DeLaughter's rulings on the law were, if anything, too favorable to Frisby. And of course once Senior Judge Yerger was appointed all of Judge DeLaughter's rulings were reviewed. So none of them could possibly hurt Frisby's ability to defend on the merits at this point. For that reason they should not have been grounds for dismissal of Eaton's case.

3. In the alternative only, the procedures invented by the trial court violated Eaton's rights in so many ways that, if this Court does not reverse, render, and order trial on the merits, then it should remand so that Eaton can have an opportunity to have an evidentiary hearing before a judge who is not from Hinds County with an independent party who is not being paid by Frisby as prosecutor.

ARGUMENT

I. The circuit court erred when it sanctioned Eaton $1.56 million for an error in an interrogatory answer that caused Frisby no prejudice.

A. The standard of review is *de novo* because the trial court applied the wrong legal standards.

The standard of review here is *de novo* because the trial court committed errors of law that mean there should be no deference to the discretion normally afforded the trial court when it imposes a litigation sanction. In order to overturn a trial court sanction, an appellant must show that the trial court abused its discretion. However, when the court "reviews a decision that is within the trial court's discretion, it *first* asks if the court below applied the *correct legal standard*." *City of Jackson v. Rhaly*, __ So.3d ___, 2012 WL 1432549 (Miss., April 26, 2012) (quoting *Amiker v. Drugs for Less, Inc.*, 796 So.2d 942, 948 (Miss. 2000)) (emphasis by *Rhaly* court). If the trial court has exercised its discretion "against a substantial misperception of the correct legal standards, our customary deference to the trial court is pretermitted ... for the error has become one of law." *Sperry New Holland v. Prestage*, 617 So.2d 248, 252 (Miss. 1993) (citations omitted) (quoting *Nationwide Mutual Ins. Co. v. Evans*, 553 So.2d 1117, 1119 (Miss. 1989)).

Here both the Special Masters and the circuit court committed several legal errors of law which mean this Court should look at the sanction *de novo*.

- The correct legal test, which the Circuit Court did not apply, is whether Eaton was "grossly indifferent to its discovery obligations" not whether it was responsible for some undefined "willful neglect."
- No one should have been sanctioned for an incorrect and incomplete description in an interrogatory answer where it asserted a privilege, identified the agreement, and the description given was adequate to alert the opposing party to a need to file a motion to compel.

- Eaton itself should not have been sanctioned when it put the facts in outside counsel's hands and trusted counsel to decide the necessity and manner of disclosure, and
- The trial court gave no weight to the well-settled principle that where an interrogatory answer is merely incomplete or evasive, an opposing party that does not move to compel cannot recover a sanction. 53:16984, ARE 162.

Because of these legal errors, this Court should examine the discovery sanction question *de novo*. For the sake of economy of briefing, Eaton adopts the Brief of Appellant Michael S. Allred on this issue, but offers this separate argument as to Eaton's corporate liability for the sanction.

B. The legal test is whether Eaton showed "gross indifference to discovery obligations" in responding to discovery.

This Court has defined the factors to be considered in assessing discovery sanctions. They include whether the violation was the result of "willfulness or bad faith" and whether the violation was "attributable solely to trial counsel instead of a blameless client." *City of Jackson, supra*, at ¶ 12 (quoting *Pierce v. Heritage Props., Inc.*, 688 So.2d 1385, 1389 (Miss. 1997). Also to be considered are the prejudice to the opposing party and the need to deter future violations. *Id.* Willfulness in turn must be based either on an attempt to conceal evidence or on a "gross indifference to discovery obligations." *Id.* at ¶ 13 (quoting *Pierce*, 688 So.2d at 1390). Because the interrogatory response identified the Georgeff agreement and mentioned other "communications," the issue here is not concealment but "gross indifference to discovery obligations."

Eaton is aware that the trial court reports and opinions are shot full of assertions that the interrogatory answer did not in fact identify the Georgeff agreement. The Court can read the answer itself and see that there is no basis for these assertions. That the trial court masters and judges saw fit to make them reflects the violence with which Frisby has prosecuted its sanctions

motion, not the evidence in the case. *See* S.16:6722, ARE 114 ("false denial of the existence" of the agreement); S.16:6682, ARE 74 (quoting only first phrase of interrogatory answer); S.134:32834, ARE 171 ("sworn response, denying the existence of any such agreement"). On this issue, Judge DeLaughter certainly got it right: "[A]nyone reading Allred's discovery responses concerning Milan Georgeff, including Frisby ... knew that some kind of indemnity agreement existed." S.39:10245-46, ARE 138-39.

C. No one was grossly indifferent when the answer gave Frisby enough information to allow Frisby to contest the assertion of privilege.

Insofar as the sanctions applies to Eaton, the "gross indifference" standard requires the court to look at the interrogatory answer from Eaton's point of view and to consider what the "discovery obligations" truly were. Special Master Dunbar's "willful neglect" standard was wrong as a matter of law because he did not define the discovery obligations correctly and failed to give any weight to reliance on outside counsel.

Special Master Dunbar erred as a matter of law when he faulted Eaton for "intentional reluctance on the part of Eaton to disclose the full content of the Consulting Agreement" in 2005. S.16:6691, ARE 83. Eaton did not have an obligation to "disclose the full content" of the Georgeff Agreement in the interrogatory answer. Eaton asserted a privilege, the common litigation privilege, which no judge had yet rejected. Disclosing "full content" would have waived the privilege.

When a party asserts a privilege, it is obvious to any reader that the whole document is not going to be disclosed. All that is attempted is to "demonstrate, with evidence short of revealing privileged information, that the documents here in question contain privileged information." *ERA Franchise Systems Inc. v. Northern Insurance Companies of New York*, 183 F.R.D. 276 (D. Kan. 1998), *quoted in* A. A. Blakely, *Privilege Log Dilemma*, in Federal Lawyer 24 (November/December 2005).

In asserting privilege, a party's duty is to provide the opposing party with "sufficient information to contest the claim of privilege." R. Morton, *Discovery* § 7.10 in MISSISSIPPI CIVIL PROCEDURE (J. Jackson ed. 2009), *citing Roman Catholic Diocese of Jackson v. Morrison*, 905 So.2d 1213 (Miss. 2005). Here the interrogatory response reported the existence of the agreement, the parties, and some of its terms. It also reported the existence of other "communications." That was "sufficient information to contest the claim of privilege." In fact, Frisby immediately did contest it. As Special Master Dunbar admitted in his initial opinion describing the discovery violation which neither party appealed, "the defendants were aware of Eaton's privilege claims." 32:6621, ARE 51.

D. Eaton's O'Flaherty was entitled to rely on outside counsel.

Not only was the answer consistent with Eaton's "discovery obligations," but Eaton was also entitled to rely on outside counsel to take care of discovery. A client is entitled to rely on outside counsel when it comes to the "regular course of practice." *Hayden v. State*, 972 So.2d 525 (Miss. 2007). Here O'Flaherty had one Mississippi lawyer and at least four Wisconsin lawyers working on the answers. She had every right to rely on them.

Special Master Dunbar wrongly faulted O'Flaherty for not insisting that the document be i) put on a privilege log or, in the altemative, ii) produced. S.16:6714-15, ARE 106-07.

But Dunbar had previously held that the failure to put the document on a privilege log was not a violation because Mississippi rules do not require such a log and the interrogatory answer revealed the existence of the agreement and other "communications." 32:6621, ARE 51. And if the agreement was going to be produced after Frisby challenged the privilege claim, it did not have to be listed yet again.

In addition, as Judge DeLaughter observed, O'Flaherty had the right to rely on outside counsel who repeatedly said that they would produce the agreement. S.39:10248, ARE 141.

That statement was made in June and even into October when Emily Feinstein emailed O'Flaherty to that effect. 23:7825 ("We believe we will produce these letters, for a number of reasons . . . . We do not think this letter agreement will hurt us in the long run because Georgeff's story has proven to be true"). Eaton and O'Flaherty did not show "gross indifference" by leaving the timing of the production to its outside counsel.

E. Eaton also should not have been sanctioned when Frisby did not have to file a motion to compel.

The worst characterization of the interrogatory answer would be that it was incomplete as to the communications and evasive to some degree concerning the agreement.

When an answer is merely "incomplete or evasive" in a way that can be overcome by a motion to compel, a motion must be filed before sanctions can be sought. Mississippi law has long held that if a party "gives an incomplete or evasive answer to a discovery request" then "a prior order compelling discovery" is required before discovery sanctions may be imposed. *Denman v. Hardy*, 437 So.2d 426, 429 (Miss. 1983); *Tennin*, 960 So.2d at 393; S.39:10237. The motion requirement is excused only where the opposing party has no way of knowing a motion is needed. *See Denman, supra*; *City of Jackson, supra*. Special Master Dunbar cited this rule but erred in failing to apply it. S.16:6720, ARE 113.

In this case Frisby got the document in November 2005 with Allred's approval. S.39:10236. It did not have to move to compel. It did litigate the privilege issue with respect to other Georgeff documents, but there were good grounds for the assertion of privilege. In fact, Dunbar's reason for rejecting the joint defense privilege was wrong. He said it did not apply because Georgeff and Eaton opposed Frisby in separate suits, 26:4843-46, ARE 5-8, but a common opponent is all that is required. *See Hewes*, 853 So.2d at 1249. In any event, there never should have been any sanction against Eaton or anyone else for the interrogatory answer. Even Judge DeLaughter's sanction – the cost of filing a motion to compel – makes no sense

because Frisby never incurred those costs. It got the agreement without ever having to file a motion.

F. The imposition of a sanction, absent the required findings and procedures, is inconsistent with Mississippi law.

In short, none of the relevant legal factors call for a sanction against Eaton here. Eaton was entitled to rely on outside counsel to respond to discovery correctly. It was not "grossly indifferent to its discovery obligations." Even if Eaton should have known that the answer was incorrect in ways immaterial to the discovery obligation, Frisby suffered no prejudice. And because Eaton approved Frisby being given the document without the necessity of filing a motion to compel, no deterrent sanction is needed. *See Wood v. Biloxi Public School District*, 757 So.2d 190, 193-95 (Miss. 2000) (reversing sanction for ambiguously worded interrogatory response).

For these reasons, this Court should reverse and render the discovery sanction against Eaton.

II. Eaton did not commit "fraud on the court" by hiring Ed Peters even if it knew that, on a few occasions, he had talked to Judge DeLaughter about non-merits matters or dealings with a federal judge and had predicted what Judge DeLaughter might do.

A. The standard of review is *de novo* because this Court exercises ultimate authority over the legal profession, the trial court applied the wrong law, and it also refused to hear testimony.

As with respect to the discovery sanction, the standard of review is *de novo* because the trial court did not follow applicable law when exercising its discretion and dismissing Eaton's case for "fraud on the court." And this Court owes the trial court no deference because it has before it the same paper record that was before the trial court which refused to grant Eaton an evidentiary hearing.

As set out more fully in Part III, the procedure invented by the trial court and Special Master Dogan trampled on Eaton's rights in many ways. The trial court refused to follow the

simple discovery and evidentiary procedure adopted by Judge William Coleman in *Barrett v. Jones, Funderburg, Sessums, Peterson & Lee, LLC*, 27 So.3d 363, 367 (Miss. 2009), and which was thought sufficient to handle an accusation of actual bribery. Among other things, Eaton never got an evidentiary hearing and was hamstrung by privilege rulings which kept it from presenting the substantial part of its evidence.

In addition, the trial court abused its discretion by making numerous errors of law:

- The trial court failed to apply the "any hypothetical reasonable juror" standard for clear and convincing evidence, pp. 28, 41-43, *infra*.
- The trial court committed manifest error in disregarding the undisputed evidence that Ed Peters did legitimate legal work and that Frisby knew Peters had been retained by Eaton and had not entered an appearance, pp. 32-33, *infra*.
- The trial court ignored the legal standards applicable to *ex parte* contacts, pp. 30-32, *infra*.
- The trial court held against Eaton inadmissible evidence of actions by Peters about which Eaton had no knowledge and that were not in the "ordinary course" of representation, pp. 38-41, *infra*.

For these reasons, this Court should review this record *de novo*, as it would have had the charge instead been contempt of court. *Brame v. State*, 755 So.2d 1090, 1094 (Miss. 2000).

Even if this Court were to accept the Circuit Court's finding that Eaton's in-house counsel knew that Ed Peters talked directly to Judge DeLaughter *ex parte*, that fact is not dispositive. It is not dispositive because any contact with the court that the evidence shows Eaton knew about is not so clearly and convincingly a contact about the merits of the case designed to influence the judge as to merit the imposition of the sanction of dismissal.

The charge of "fraud on the court" is "reserved for only the most egregious misconduct" and requires an "unconscionable plan or scheme which is designed to improperly influence the court in its decision." *Tirouda v. State*, 919 So.2d 211, 215 (Miss. Ct. App. 2005) (quoting *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir. 1989)). In *Tirouda,* perjury about the merits provided a reason to set aside a judgment for fraud on the court. *See also Zurich North America v. Matrix Serv., Inc.*, 426 F.3d 1281, 1291 (10th Cir. 2005) ("only the most egregious conduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated").

B. The *ex parte* contacts must be looked at from Eaton's point of view based on what clear and convincing evidence shows it knew.

Fraud on the court must be proven by clear and convincing evidence. *Taft v. Taft*, 172 So.2d 403, 407 (Miss. 1965); *Tirouda,* 919 So.2d at 216 n.4. Mere assumptions, insinuations, or suppositions as to what evidence shows do not meet the standard. *Madden v. Rhodes*, 626 So.2d 608, 622-24 (Miss. 1993). To meet the clear and convincing standard, the evidence of fraud must be "so clear that no hypothetical reasonable juror hearing the proof could conclude otherwise." *Haygood v. First Nat'l Bank of New Albany*, 517 So.2d 553, 555 (Miss. 1987). The standard of proof is so high that not even overwhelming weight of the evidence will satisfy it. *Niebanck v. Block*, 35 So.3d 1260, 1264 (Miss. Ct. App. 2010). In this case the only trier of fact, the Special Master, refused to apply this standard, S.145:34682, ERE 180 ("reasonable inference"), S.145:34711, ERE 209 ("preponderance of the evidence"), and the circuit court manifestly erred in just concluding, without hearing any evidence, that if it applied it was met. S.151:35456.

The conduct alleged to be fraud on the court is ex *parte* contact between Ed Peters and Judge Bobby DeLaughter. But the ambiguous nature of the *ex parte* rules in actual practice limit the inquiry because fraud on the court requires a knowing law violation.

C. Not all *ex parte* contacts are unlawful and both an intent to influence the judge and prejudice on the merits must be shown to justify any sanction touching on the merits.

The rules governing ex *parte* contacts are far from clear and depend to a great extent on local custom. The trial court erred by assuming that all *ex parte* contacts were "improper" and that Eaton should have known this. S.145:34685, ERE 183; S.151:35450, ERE 223. As this court said in excusing an *ex parte* phone call about a contact on a procedural matter with a member of court staff, it is not a violation of the rules to engage in what "appeared to be a common and accepted practice" at the time. *Mississippi Bar v. Logan*, 726 So.2d 170, 178 (Miss. 1998). The law has been said to be unsettled about such matters as contacts concerning the correction of judgments, *In re Wilson*, 461 N.W.2d 105, 109 (N.D. 1990), and appointment of a receiver, *In re Gillis*, 686 P.2d 358, 361 (Or. 1984). Jack Weiss, formerly a litigator in Louisiana and New York and now chancellor of the LSU Law Center, put it this way:

> The practice [concerning *ex parte* communications] differs widely from jurisdiction to jurisdiction and may well depend on the local level of formality. In a small rural county, an elected trial judge may approach informal contacts with lawyers very differently than would a federal district judge in a large city. Small-town judges and lawyers see each other outside of court all the time and therefore may not perceive these contacts to be in any way inappropriate.

Jack M. Weiss, *It Depends on the Meaning of "Ex Parte,"* 29 Litigation 27, 28 (Winter 2003). In this case, for example, the court expressly approved *ex parte* contacts with Special Master Dunbar when he was trying to mediate disputes among the parties. *See* p. 5, *supra.*

Discuss anything but the "merits." To take another example, the 1969 ABA Code of Professional Conduct DR 7-110(B) permitted any *ex parte* contact that does not concern the "merits" of a case. Many jurisdictions still retain that as the relevant distinction. *See* Weiss, *supra.* Mississippi Uniform Circuit and County Court Rule 1.10 forbids "earwigging" which is a

discussion of "the law or facts or alleged facts of the case" or trying to "influence the decision of the judge" in any way other than in arguments and briefs.

Discuss administrative matters. Our courts have said that *ex parte* contact with a court is permissible with respect to "administrative" matters. *Zimmerman v. Three Rivers Planning & Dev. Dist.*, 747 So.2d 853, 857 (Miss. Ct. App. 1999). Our current Code of Judicial Conduct, Canon 3 B.7(a) declares that *ex parte* contact with a judge "for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized" if, among other things, the judge notifies other parties. Of the notice requirement, Weiss says "[t]his requirement seems unnecessary and, in my experience, far more honored in the breach than in the observance in the case of the truly innocuous inquiry such as a question about the judge's trial calendar." Weiss, *supra*, at 30. *Zimmerman* quotes the rule without mentioning the requirement. 747 So.2d at 857. In this case, Frisby has admitted to more than a dozen *ex parte* conversations with Judge DeLaughter's court administrator and present and former law clerks about hearing dates, when an order would be issued, whether Frisby would object to a report, how much Judge DeLaughter "hated" the case, and to whom a reassignment would be made. S.131:32299-310.

Need to show prejudice to case on the merits. Most discussions of *ex parte* contacts take place in the ethics context. The Mississippi Code of Professional Conduct says that its rules are not intended to create legal liability. When *ex parte* contacts have been raised as a grounds for reversal of a court decision, courts have required the opposing party to demonstrate "manifest injustice," i.e., prejudice to the opposing party's case. *Lund v. Lund*, 849 P.2d 731, 736 (Wyo. 1993), abrogated on other grounds, *Vaughn v. State*, 962 P.2d 149 (Wyo. 1998). In *Lund*, no prejudice was found even though counsel for one party had talked to the judge *ex parte* in order to keep secret the location of certain assets. Courts have similarly found no prejudice where a

trial judge who had engaged in serious misconduct in another case discussed a hearing schedule *ex parte*, *In re Met-L-Wood Corp.*, 861 F.2d 1012, 1019 (7th Cir. 1988); or a judge made an *ex parte* request for a brief on pre-judgment interest, an issue not previously raised, *Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, 678-679 (4th Cir. 1989); or the state submitted a pretrial brief *ex parte*, *O'Connor v. Leapley*, 488 N.W.2d 421, 423 (S.D. 1992); or a judge met *ex parte* with prosecutors before trial to discuss an investigation into allegations that the defendant attempted to murder a witness, *Wesbrook v. State*, 29 S.W.3d 103, 121 (Tex. Crim. App. 2000) (unethical but not grounds for reversal).

In light of these vagaries, the question in this case is whether the evidence shows clearly and convincingly that Eaton knew of *ex parte* contacts between Peters and Judge DeLaughter that clearly and convincingly constituted fraud on the court and prejudiced Frisby on the merits. It did not. In fact, the Special Master's description of the *ex parte* contacts shows that they concerned contacts concerning hearing dates and trial settings as well as predictions as to what the court might do. S.145:34697, ERE 195.

D. Judge Yerger's dismissal ruling does not demonstrate fraud on the court by clear and convincing evidence.

Judge Yerger's December 22, 2010 order dismissing Eaton's case, 96:35442-67, ERE 215-40, recites a number of facts which he says are "red flags" that provided clear and convincing evidence of fraud on the court. 96:35456-63, ERE 229-36. But some of those "facts" are just wrong, others are taken out of context, and still others do not have the legal significance he attributes to them.

1. Ed Peters was retained for legitimate purposes and did legitimate legal work.

Having refused to allow Eaton to put on certain evidence of Peters' legal work, see S.140:33752, the circuit court adopted without question the Special Master's view that the witnesses could not explain the role that Peters was to play in the litigation. S.127:31409, ERE

131 ("no idea what Peters was hired to do"); S.151:35459, ERE 232. But that is simply not true. Eight witnesses testified to the work that Peters did and that it was intended that he would do. S.115:29755-56, 66-67 (Allred); S.114:29579 (Anderson); S.113:29427-28 (Banks); S.113-29468-70, 79 (Everts); S.114:29650, S.115:29696, 98 (Leo); S.113:29437, 53 (McGuire); S.114:29621 (O'Flaherty); S.113:29514, S.114:29521, 25, 40, 61-62, 68-69 (Schaalman).

As stated in the email quoted above, Mike Allred recommended Peters not only because he was the "closest possible associate" of Judge DeLaughter, but also because he could make "a very powerful presentation in court." Eaton wanted Reuben Anderson and Ed Peters to try the case. S.114:29579; S.114:29523.

But in the short term, because he was not expected to participate in discovery and there was some concern about recusal, Peters was given assignments to do things that did not require him to add his appearance to that of the other seven attorneys Eaton had on the pleadings. For example, he consulted with Eaton's other counsel and reviewed a draft of the brief that objected to the Dunbar discovery sanction recommendation. S.113:29470 (Everts). He offered extensive edits and comments. He did that to give advice about the arguments to which Judge DeLaughter might be receptive. 68:18812-13. The draft on which he wrote his comments is one of the items of evidence Judge Yerger refused to consider even though he had previously reviewed it when doing a *Hewes* analysis, S.137:33327. Peters also met with witnesses and with the U.S. Attorneys' Office on Eaton's behalf. S.113:29470, 79 (Everts); S.114:29561 (Schaalman).

2. Frisby knew that Peters was working for Eaton without entering an appearance or being on email.

Judge Yerger's most glaring factual error was the sole premise upon which his "fraud" finding was based, *i.e.*, his belief that Eaton "secretly retained Ed Peters." *See* p. 10, *supra*. This was just not true.

Both Peters and Fred Banks at various times discussed with Frisby counsel that Peters was working for Eaton:

- In January 2007, Banks' office sent an email to Frisby counsel and copied Peters along with other Eaton counsel. 43:14303.
- In February 2007 Peters openly participated in an Eaton lawyer tour of Eaton's Vickers plant in Jackson where numerous friends of the engineer defendants worked. S.141:33883-84.
- Then Peters himself by mistake sent to Frisby counsel an email in which he was giving Eaton legal advice. S.63:16126. Later, instructions were given to keep Peters off Quarles & Brady's email lists for fear he would do the same thing again. S.114:29517, ERE 24.
- After it knew of Peters' involvement, Frisby hired Tom Royals, another experienced criminal lawyer and associate of DeLaughter. Peters told Quarles & Brady that he had informed Royals that Eaton had hired him and Royals reported that to Frisby. S.115:29713-15.
- Peters met with lawyers for witnesses, including Ray McNamara and Percy Stanfield, who reported this to Frisby. S.63:16152-53.
- In the September of 2007, Alan Perry, Frisby's lead lawyer, acknowledged in a conversation with Fred Banks that he knew Peters was working for Eaton. S.113:29393.
- Peters participated in meetings with the U.S. Attorney's office, where he was well known, concerning the parallel criminal case. S.113:29479.

There is no contrary evidence. There is no testimony by any Frisby witness that Frisby did not know that Peters was working for Eaton during 2007. In addition, Eaton knew that

Frisby was aware of Peters' involvements. The trial court's conclusion that Eaton "retained" Peters in secret and sought to hide his presence is manifestly erroneous.

3. Eaton did not know of any *ex parte* contacts between Peters and Judge DeLaughter that Eaton knew to be illegal.

Judge Yerger relied on two emails which he said were the "most direct documents which evidence Eaton's and its counsel or corporate officers' knowledge of Peters improper conduct," 151:35461, and a third relevant email has since been discovered. ERE 11-13.[9]

March 24, 2007 email. Eaton's objections to the Dunbar discovery sanction recommendation as well as a stay issue were pending before Judge DeLaughter. After discussing delay, Peters reported to an Eaton lawyer that patience was warranted and that he *thought* Eaton would be "VERY PLEASED" with Judge DeLaughter's ruling. ERE 11. As discussed in Part I of this brief, there were multiple reasons why the Dunbar ruling should have been reversed. *See* pp. 21-27, *supra*. Even if this email were taken as evidence that Peters had talked to DeLaughter, or vice versa, it does not show that he influenced him, particularly since the resulting order was reversibly unfavorable to Eaton, as shown in Part I above.

April 7, 2007 email. This email begins with a report that Peters intended to speak with the court administrator and the judge about the trial date. S.151:35461, ERE 15. Neither of these subjects goes to the merits of the litigation. Both subjects are administrative in nature.

The email was written a day after DeLaughter had deferred imposition of sanctions. *See* p. 7, *supra*. The email goes on to state Peters' view that there was "a 100% chance ... maybe I am off a percent or two" that Judge DeLaughter would not decide the money amounts until after the trial. That is what he had done in *Cooper Tire & Rubber Co. v. McGill*, 890 So.2d 859 (Miss. 2004). But, if anything, the facts rebut any inference of *ex parte* conduct because on April 16

[9] *See supra* p. 13.

Judge DeLaughter ordered Frisby to submit its claim for the expense of a motion to compel. S.39:10258-59, ARE 151-52. Frisby complied, S.140:10473-82, but never pressed the circuit court for a ruling on the question. *See* p. 7, *supra*.

October 16, 2007 email. Eaton was concerned about the actions of federal judge Tom Lee, who had called Judge DeLaughter and objected to orders of the circuit court which would have allowed Eaton to depose the defendant engineers. Eaton thought Judge Lee should have recused himself because his son-in-law's law firm was in the criminal case. It also thought Judge Lee's method of stopping the depositions – a phone call to Judge DeLaughter followed by a letter – was unusual. S.115:29682-83; S.113:29419-20; S.120:30537.

Eaton counsel decided that counsel for all parties should meet with Judge Lee but, knowing nothing about the relationship between Judge DeLaughter and Judge Lee, were concerned what Judge DeLaughter's reaction to that would be. S.116:29594 (Anderson); S.113:29421 (Banks). Reporting to a superior, Eaton internal counsel said:

> Judge DeLaughter felt uncomfortable about the contact from Judge Lee and certainly Ed Peters has taken his temperature on this meeting and he is recommending that we go forward with it.

S.121:30573, ERE 26. In another email in the same chain, later discovered and produced, another Eaton employee then expressed relief that Judge DeLaughter did not oppose the meeting. ERE 27.

None of this is clear and convincing evidence of fraud on the court. Applying the *Haygood* standard, the evidence does not meet that standard because a "hypothetical reasonable juror" could conclude that these contacts did not alert Eaton that an illegal conversation had taken place. They did not reveal an attempt to influence the judge as to the merits of the case. They did not involve the "facts or law" within the meaning of the earwigging rule. They were about administrative matters, timing, predictions, and relationships with another court. They did

not constitute an unconscionable plan or scheme designed improperly to influence the Court in its decisions. The circuit court erred as a matter of law when it ruled that this was clear and convincing evidence of fraud on the Court.

4. Judge DeLaughter's rulings do not reveal improper influence or show prejudice to Frisby.

Nor was there any reason to conclude, as Dogan and Judge Yerger did, that Judge DeLaughter's four rulings during 2007 showed a bias to Eaton that should have put Eaton on notice that Peters was influencing Judge DeLaughter. S127:31410, ERE 132; S145:34676-78, ERE 174-76; S.151:35458-59, ERE 231-32. Dogan found the rulings "inexplicable," S.145:34696, ERE 194, and in words copied and emphasized by Judge Yerger, said he found it "incredible that no one on the Eaton team was aware of the impact Peters was having on the rulings Eaton was receiving." S151:35458-59, ERE 231-32, quoting S127:31409, ERE 131. But this Court can examine the rulings for itself and see that the rulings, if anything, favored Frisby. In conducting that examination, it should also refer to the expert analysis of those rulings by Eaton's law professor expert. *See* n.10, *infra*.

The first ruling, which imposed a monetary sanction on Eaton for the Georgeff interrogatory answer, was too favorable to Frisby for the reasons stated in part I of this brief.

Moreover, in that ruling Judge DeLaughter said the agreement with Georgeff violated the statutory allowance for payments to witnesses in MISS. CODE ANN. § 25-7-47. S.39:10253-56, ARE 146-49. In fact, Dogan and Judge Yerger subsequently questioned the ethics of the agreement. 50:15774, ARE 154-58; 53:16987-88, ARE 165-66. But in so ruling, all of them overlooked Miss. Ethics Op. 145 (March 11, 1988), which says there is no statutory or ethics violation when a party indemnifies a witness for costs incurred as a result of testimony, which is the only indemnification Georgeff ever received. That error also favored Frisby.

Second, Judge DeLaughter refused to default defendant engineer Billy Grayson who destroyed incriminating records after the FBI missed them, *see* p. 4-5, 7, *supra*, and then signed two sets of interrogatories denying what he had done. S.47:12067. Grayson admitted the truth only when he was deposed. S.47:12066-69. Judge DeLaughter said he would not default Grayson because Grayson had not been under a court order. 40:13186-89, ERE 41-44. But in so ruling he overlooked that when the FBI searched Grayson's office, they did so pursuant to a judge's search warrant. This too was an error in Frisby's favor. 53:16977-78, ERE 81-82. *See also* 63:18894-95 (Yerger affirms DeLaughter).

Third, Judge DeLaughter reversed Dunbar and said the defendants would have to assert their Fifth Amendment rights on a question-by-question basis in depositions. 34:11302-08, ERE 48-54. But that ruling was manifestly correct, and this Court denied interlocutory review. *See* p. 7, *supra*.

Finally, Judge DeLaughter said Eaton was entitled to conduct discovery and find out what Frisby had stolen before it would be required to specify which of its trade secrets Frisby was using. 40:13254-58, ERE 64A-68. That ruling made manifest sense and was later reversed only in so far as it did not require Eaton to reveal the secrets it already knew Frisby was using. *See* p. 7, *supra*.

Because these rulings were, if anything, correct or too favorable to Frisby, they did not put Eaton on notice that something was amiss nor did they prejudice Frisby in the defense of this case.[10]

[10] Eaton submitted the affidavit and expert opinion of Ole Miss law professor Gary Myers, now the Dean of the University of Missouri Law School, who reviewed all of DeLaughter's 2007 opinions and related briefing. Professor Myers concluded that there was "no evidence of a 'red flag' . . . that would have placed a reasonable attorney on notice, prior to his recusal, of possible undue influence on Judge DeLaughter by Mr. Peters." S.141:33867. This evidence was not rebutted.

5. What Eaton did not know should not be held against it.

A client is entitled to assume that what his lawyer does will be in the "regular course of practice" and is not responsible for actions taken outside that "course" of which the client has no knowledge. *Barrett*, 27 So.3d at 376; *B.F. Goodrich Rubber Co. v. Holland*, 131 So. 882 (Miss. 1931). *See also O.W.O. Inves., Inc. v. Stone Ins. Co. Inc.*, 32 So.3d 439 (Miss. 2010). In *Barrett*, this court found that an attempt to bribe a judge was not within the "ordinary course" of a party's business and set aside an order striking its pleadings. This Court cited *Perna v. Electronic Data Sys. Corp.*, 916 F. Supp. 388, 402-03 (D.N.J. 1995), for the proposition that "dismissal of the partnership's claim without a demonstration of an intentional and willful conduct on the part of the entire partnership is too severe a sanction." 27 So.3d at 376. Elsewhere it said liability had to be based on "red flags" a party had seen. *Id.* at 375. It exonerated the partnership even though there was at least one "red flag": The partnership had issued a check for voir dire in a case that had not yet gone to trial.

For three reasons, the circuit court erred in concluding that statements Ed Peters made to the FBI after he quit working for Eaton[11] provided evidence of Eaton misconduct.

First, Eaton did not know about the statements nor did it, except as discussed in the email described above, know about the actions they report. Where the dismissal sanction is sought, actual knowledge must be shown. *See Barrett, supra.* They thus have no probative value.

Second, the statements are hearsay claims made by a witness who cannot be cross-examined and who had every reason to exaggerate DeLaughter's wrongdoing in order to expand his own immunity from prosecution. They are not competent evidence of anything. *United States v. Whitfield*, 590 F.3d 325, 363 n.28 (5th Cir. 2009). They are hearsay from a witness who

[11] Peters discussed *Eaton v. Frisby* in two contradictory interviews with the FBI. The Form 302 summaries of these two interviews are found at S.130:32137-39, ERE 255-57, and S.131:32140-44, ERE 258-62.

has refused to testify and has taken the Fifth Amendment for reasons that have nothing to do with this case. In *Minnick v. State*, 551 So.2d 77, 88 (Miss. 1989), *rev'd on other grounds*, 498 U.S. 146 (1990), this Court upheld the exclusion of similar hearsay found in an FBI document. It said the fact that a statement was made to the FBI did not make it trustworthy as required by Miss. R. Evid. 804(b)(5). *See also United States v. Whitfield, supra*; *United States v. Bailey*, 581 F.2d 341, 349-50 (3rd Cir. 1978); *Gibson v. Wright*, 870 So.2d 1250, 1260 (Miss. Ct. App. 2004). The circuit court erred in saying Peters – who lied to Fred Banks on this very subject – could be trusted because he was a lawyer. S.145:34624, ERE 294.

Third, the statements themselves do not implicate Eaton and provide nothing to suggest that Eaton knew of the activities they detail, even if those otherwise unproven activities actually happened. Because it is necessary to examine them to reach that conclusion, however, this Court must see what they *actually* say.

Peters did not implicate Eaton. The most important thing about the statements is that they do not implicate Eaton in any way. Peters had every incentive to give the FBI another target if the facts would justify it. But he did not. The circuit court admitted as much. S.151:35458.

Peters told Frisby's Tom Royals he would try the case for Eaton. The statements, collected in ERE 255-62, first report the conversation between Peters and Tom Royals, his former assistant in the district attorney's office, in which Peters told Royals he was working on the case. Peters anticipated that Peters would be trial counsel. *Id.*

Peters told Judge DeLaughter Dunbar's discovery sanction was "smoke and mirrors." With respect to the objections to Special Master Dunbar's discovery recommendation, the statements say:

> PETERS told DELAUGHTER that the Special Master's report was very hurtful to EATON. PETERS asked DELAUGHTER to read the report for its content and to be cognizant of the "smoke and mirrors" that he believed were contained in the report. S.131:32141, ERE 259.

And he also said:

> PETERS admitted to having *ex parte* communication with DELAUGHTER about the EATON case. PETERS may have talked to DELAUGHTER about this aspect of the case on more than this one occasion [but he doesn't believe so]. DELAUGHTER did eventually change the Special Master's Order to a position that was helpful to EATON. S.131:32141, ERE 259.

In another statement he said:

> PETERS did discuss discovery violations with DELAUGHTER and asked him not to take any hasty action toward levying fines against ALRED [sic] for discovery violations. S.130:32138, ERE 256.
>
> United States District Court Judge LEE asked DELAUGHTER to stay the civil depositions of the EATON case so that criminal case of EATON could go forward which was contrary to the Judge's Order & a ruling of the Ms. Sup. Ct. S.131:32141, ERE 259.

DeLaughter asked Peters about choice of a Dunbar replacement. Finally, Peters said that, after DeLaughter decided to fire Special Master Dunbar, he asked Peters who should replace Dunbar and Peters recommended Larry Latham:

> DELAUGHTER released DUNBAR as Special Master because he had reviewed all of DUNBAR's orders and overruled them. He also released him because he had been ill. PETERS stated that it was obvious that DUNBAR was prejudice [sic] to FRISBY as DELAUGHTER was to EATON. S.130:32138, ERE 256.
>
> After DELAUGHTER released DUNBAR, he asked PETERS who could be a good Special Master. PETERS conducted research into the matter and concluded that LARRY LATHON [SIC] would be a good choice. DELAUGHTER did appoint LATHON [SIC] as Special Master of the case. S.130:32138, ERE 256.

In another statement after recapping this conversation, Peters talked about calling Latham:

> PETERS called Latham and congratulated him for being appointed Special Master. Sometime later, PETERS called LATHAM back and told

> him not to mention his name to anyone. PETERS was afraid of being attacked in the press for this action. S.131:32142, ERE 260.

The statements also confirm Peters' belief that he was hired on an oral agreement for a one percent attorneys' fee on a case that was possibly worth $200 million and that Peters "believes he had influence over DeLaughter in the Eaton case."

Finally, Peters did not act as he did in the Scruggs case. It is noteworthy that Peters told the FBI that his discussions with DeLaughter in this case were *not* like the ones he had in the Scruggs case where it was "clearly understood" that he was hired and paid money to influence DeLaughter, not to develop the facts or try the case. S.119:30330-31. Peters was never paid anything here and no one in this case made an offer of any kind to Judge DeLaughter.

Because a "hypothetical reasonable juror" could conclude that Peters did not tell Eaton what he told the FBI, these statements to the FBI do not provide clear and convincing evidence that would justify a finding that Eaton perpetrated a fraud on the court equivalent to the perjury or bribery that have been held to constitute "fraud on the court" in the past.

6. A mere suspicion or even permissible inference is not clear and convincing evidence.

This Court's rulings in attorney discipline cases are instructive because the same "clear and convincing" standard applies in those cases as applies here. For example, in *Attorney U v. Mississippi Bar*, 678 So.2d 963, 972 (Miss. 1996), the court considered whether a "reasonable lawyer" would have a "firm opinion" that an ethical violation existed that required a report to the bar. The court found no clear and convincing evidence to support such a charge even though the bar found the lawyer had tried to enforce against a second attorney an unethical verbal contract in which a second attorney had promised a pulmonologist expert a contingent fee. The court said the facts did not clearly and convincingly show the accused attorney knew of an ethical violation by the second attorney because, among other things:

- the rules do not define what it means to say the first attorney had "knowledge," *id.* at 970.
- a lawyer does not have to believe his client in order to assert a claim on his behalf, *id.* at 972.
- the second attorney, who had proposed a contingent fee in writing, denied having ever actually entered into such an arrangement, *id.* at 972.

The Court accordingly reversed the bar's decision to discipline the lawyer who failed to report the second attorney's apparent violation. *See also Levi v. Mississippi State Bar*, 436 So.2d 781, 787 (Miss. 1983) (no clear and convincing evidence that lawyer defrauded former partner of fee to which he was contractually entitled where client objected and said fee was a "gift" to the accused lawyer). *Cf. A.B. v. Lauderdale County Dep't of Human Services*, 13 So.3d 1263, 1268 (Miss. 2009) (trial court reversed because two diluted urine samples and refusal to submit to hair screen was not clear and convincing evidence of ongoing drug addiction, even though a suspicion or inference might be justified).

As stated above, the clear and convincing evidence standard demands more than a suspicion, or a reasonable inference, or even the greater weight of the evidence. Even if it were argued that the evidence could be read to support the circuit court's conclusions, and it does not, that would not be good enough.

For all of these reasons, this Court should set aside the finding that Eaton intended to and did commit fraud on the court that justified dismissal of its complaint against Frisby. Given the uncertain nature of what *ex parte* contacts are allowed in each jurisdiction, nothing in the confidential emails shows by clear and convincing evidence that Eaton knew that Peters, a former district attorney, had crossed over the local line. Frisby knew Peters was working for Eaton and even hired its own DeLaughter associate, Tom Royals. In addition, nothing in

DeLaughter's rulings suggests that Peters' contacts improperly influenced DeLaughter, and so Frisby cannot show prejudice. The Larry Latham incident did not prejudice Frisby. And the bottom line is that Frisby got independent review of DeLaughter's rulings from Dogan and Judge Yerger and so, even if the rulings had been biased, they would have caused Frisby no ultimate harm. *In re Zhang*, 741 P.2d 267, 272 (Ariz. 1987) (independent *de novo* review cured any denial of due process caused by *ex parte* contact). Nothing about them would ever prevent Frisby from getting a fair trial on remand.

Eaton should be allowed to go forward in this case. The four-year delay in its ability to recover a very substantial judgment is punishment enough. And Frisby has now had free use of Eaton's trade secrets for 10 years, an injury that will not stop until Eaton gets a judgment. Eaton denies that any sanction is warranted, but if it is wrong on that score, these things are a sufficient "lesser sanction." *Wallace v. Jones*, 572 So.2d 371, 377 (Miss. 1990).

III. In the alternative only, Eaton is entitled to a new trial on the motion to dismiss because the procedures the circuit court invented and used violated Eaton's rights in multiple ways.

The trial court's "inquiry" into Peters' conduct quickly sailed off into uncharted waters. In the *Barrett* case, Judge William Coleman of Hinds County was appointed to preside over a case in which an attempt had been made to bribe a predecessor judge. He allowed discovery and then held an evidentiary hearing which lasted three days.

In this case the procedure lasted close to three years, was delegated to a Special Master paid $1.3 million, was prosecuted by an adverse party loyal only to the adversary, was presided over by a judge in Judge DeLaughter's court whose court administrator took the Fifth Amendment, and there was no evidentiary hearing at all.

If this Court for any reason should reject Eaton's arguments on the merits, it should remand for an evidentiary hearing before a judge not from Hinds County.

The procedures used will be taken in chronological order.

A. The court erred by putting opposing counsel in charge of the "inquiry."

Eaton objected to Judge Yerger's decision to put Frisby counsel in charge of the inquiry given the conflict between Frisby's private interests and the public good. 46:15182; 186. But the trial court overruled that objection.

When matters like this have come before Mississippi courts in the past, the trial judge has appointed an independent prosecutor to handle the matter. *See Bucklew v. State*, 209 So.2d 916, 917 (Miss. 1968). That is the practice when the accusation is contempt of court and it should have been adopted here: "the apparent conflict of interest and pressure of "wearing two hats" militates against permitting a party's private counsel to prosecute a criminal contempt charge stemming from a civil suit." *State ex. rel Koppers Co., Inc. v. International Union of Oil, Chemical and Atomic Workers*, 298 S.E.2d 827, 830 (W.Va. 1982). *See also Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580-81 (1946) (in an investigation into fraud on the court "the usual safeguards of adversary proceedings must be observed" and those "selected by the court to vindicate its honor ordinarily ought not to be in the service of those having private interests in the outcome").

B. The court erred by not requiring the Special Master to follow the procedure of *Hewes v. Langston* in discovery depositions and by delegating all attorney-client privilege questions to the Special Master.

The trial court initially followed the procedure required by *Hewes*, 853 So.2d at 1249, with respect to privileged documents Eaton produced. But over objections it abandoned that procedure when it took depositions. S.107:28586-87; S.109:28749.

In this case the Special Master should have had an independent prosecutor act for the court. After questions were posed, the Court should have ruled on objections before Eaton was required to answer and only evidence showing criminal fraud should have been given to Frisby.

Doing it this way would have avoided the "Humpty-Dumpty" situation regarding rulings on privilege that this Court has criticized. *In re Knapp*, 536 So.2d 1330, 1333 (Miss. 1988) ("[i]f the matter thought privileged is ordered disclosed and is in fact disclosed, our later reversal would found on the Humpty Dumpty syndrome"). Instead, opposing counsel were allowed to cross-examine Eaton's lawyers, the Special Master overruled Eaton's objections, and the circuit court not only refused to hear Eaton's appeal but told Eaton that it would be sanctioned if it appealed again without success. 47:15313.

Ultimately, without addressing any of the specific questions asked by Frisby's attorneys of Eaton's attorneys, or their specific answers, the Circuit Court held that the "rulings of the Special Master as to objections at all depositions related to the 'inquiry of any alleged attempt to influence any judicial officer' are final and are also the rulings of this Court." S.109:28749.

C. The court erred after the depositions were ended by not asking for the appointment of a judge from outside of Hinds County.

The trial court had indicated that the initial proceedings before the Special Master were for discovery only. As those proceedings were concluding, Frisby filed a motion to dismiss. Within 30 days, Eaton requested recusal and sought an evidentiary hearing before a judge not from Hinds County. S.133:32620-21. The circuit court denied that request as well. S.138:33459-60, ERE 152-53.

The dismissal inquiry concerned actions of a former Hinds County circuit judge and included actions of the present court administrator who, when deposed, took the Fifth Amendment. Under these circumstances, the decision on the merits of the sanctions motion should have been referred to a judge from outside of Hinds County. *Taylor v. State*, 789 So.2d 787, 797 (Miss. 2001).

D. The court erred by sending the decision on the merits of the motion to dismiss to the Special Master.

Not only did Judge Yerger refuse to have an outside judge appointed, but he also refused to consider the merits of the motion himself because, he said, his docket was too crowded. 46:15197-201. So the merits went back the Special Master who had presided over discovery. Eaton's objection on this point was also overruled. 44:14522-38.

"[M]asters are not supernumerary judges and should not be utilized as such." *Banks v. Banks*, 648 So.2d 1116, 1124 (Miss. 1995). A crowded docket is not an "exceptional circumstance" which permits referral to a special master under Miss. R. Civ. P. 53. *Trovato v. Trovato*, 649 So.2d 815, 819 (Miss. 1995). The circuit court erred in sending the merits decision to the special master and not to a special judge.

E. The court erred by denying Eaton an evidentiary hearing and by refusing to consider its evidence.

In retrospect, it seems obvious that once Senior Judge Yerger decided in 2009 that the emails could be evidence of crime/fraud, he concluded that they were in fact sufficient proof of crime/fraud, and so whatever the procedures for discovery and proof subsequently were did not matter. In fact, in his ultimate dismissal ruling he referred to the preliminary 2009 decision as a "finding" that he would not upset. S.151:35449-50, ERE 222-23. That "finding" was, of course, based on the false belief that Frisby did not know about Peters' "retention." *See* p. 10, *supra*.

This presented Eaton with multiple problems, but two stand out.

First, the court refused to consider material evidence. It took the position that the attorney-client privilege did not exist with respect to any evidence that *supported* a crime/fraud finding. So that evidence was considered. But because evidence that *rebutted* such a conclusion remained privileged, the trial court said that either i) Eaton could not rely on it, or ii) Eaton could rely on it only if Eaton waived the attorney-client privileges altogether in this ongoing case.

S.140:33752. The court did not discuss, distinguish or even acknowledge precedent holding that a party in this position has a due process right to submit countervailing evidence, in its defense, to show there was no fraud. *In re General Motors Corp.*, 153 F.3d 714, 716 (8th Cir. 1998); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 96-97 (3d Cir. 1992). So, when Eaton attempted to offer evidence of the legitimate work Ed Peters did, the court said it would not consider the evidence because otherwise Eaton would have waived the privilege. S.140:33752.

Second, the circuit court refused to grant Eaton an evidentiary hearing. On appeal to the circuit judge, Eaton requested an evidentiary hearing and was denied. The circuit judge then made findings on the "convincing" nature of evidence given by witnesses he had never heard. This too was error. *Johnson v. City of Cleveland*, 846 So.2d 1031, 1036 (Miss. 2003). Simple due process requires a "full opportunity to present evidence." *Vaughn v. Vaughn*, 56 So.3d 1283, 1288 (Miss. Ct. App. 2011). When a trial court hears a dispositive motion on disputed evidence, an evidentiary hearing is required, and Eaton did not waive that right. *Illinois Central R.R. Co. v. Byrd*, 44 So.3d 943, 951-51 (Miss. 2010) (Lamar, J., dissenting). *See also In re Dunn*, 82 So.3d 589 (Miss. 2012) (remanding for hearing to resolve disputed affidavits).

If this Court does not reverse and render the dismissal sanction, it should reverse and remand for an evidentiary hearing before an appointed circuit judge who is not from Hinds County.

CONCLUSION

It should matter here, as it did not in the circuit court, that Eaton comes to this Court as the victim of an economic crime perpetrated by Frisby and confirmed by the FBI raid and the detailed federal bills of particulars. That crime has hurt Eaton's ability to compete against Frisby in the market for contracts needed to feed work to its Jackson plant. For 10 years now, Frisby has had free use of Eaton's technical materials and trade secrets.

Eaton has understandably had to rely on its lawyers to prosecute this case. For the reasons stated in this brief, it had the right to rely on them to conduct discovery and should not have been punished for an interrogatory answer that caused no prejudice and made no difference once Georgeff gave his agreement to Frisby with Eaton's consent. Frisby's focus on Georgeff is a ruse and a sham. Although initially important, he became irrelevant to Eaton after the FBI raid in January 2004. The evidence of Frisby's guilt at trial will not come from Georgeff. It will come from the evidence gathered by the FBI and detailed in the federal bills of particulars. And it was only after the FBI raid that Eaton filed this suit.

Eaton also had the right to believe that Ed Peters, a long-time Mississippi law enforcement official, and Judge Bobby DeLaughter, a celebrated former prosecutor, knew which *ex parte* contracts were lawful and which were not. In 2007, what we know now about their relationship was not known by Eaton, or anyone else now involved in this case. Despite the wholesale abolition of Eaton's attorney-client privilege, and an extensive investigation by Frisby's skilled advocates, the record in this case does not contain clear and convincing evidence that Eaton knew that Peters had done anything illegal which prejudiced Frisby's ability to defend against Eaton's claims. And any speculative impact Peters' contacts might have had was flushed out of this case many years ago.

Eaton for these reasons asks this Court to restore balance to this case. The alleged wrongdoing by Eaton's lawyers was remedied without any objection from Eaton. Neither law nor facts support the additional sanctions piled on by the Circuit Court. This Court should reverse those sanctions, remand for trial to determine Frisby's liability for its thefts, or grant such other relief as the court deems just.

This the 31st day of July, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a true and correct copy of the foregoing via United States Mail, postage prepaid and via hand-delivery, where indicated, to the following:

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